

### REMARKS

Applicants have updated the priority information in the specification as required by the Examiner (see the Office Action, page 6, lines 2-3). Applicants have also amended claims 1 and 2 to more particularly point out and distinctly claim the subject matter which they regard as their invention. Support for amended claims 1 and 2 can be found at page 1, lines 25-26 and page 5, lines 11-14.<sup>1</sup> This amendment has necessitated minor changes to claims 5 and 6. In addition, Applicants have amended claims 16-21 to correct typographical errors. No new matter has been introduced by the amendments.

Claims 1-29 are currently pending. Reconsideration of this application, as amended, is respectively requested in view of the following remarks.

#### Rejections under 35 U.S.C. § 102

The Examiner rejects claims 1-9, 16-25, and 28 for anticipation on various grounds. Applicants will traverse each ground below:

#### I

The Examiner rejects claims 1-4, 7-9, 16-25, and 28 as being anticipated by Gorsek, U.S. Patent 6,649,195 (the '195 patent). Claims 1 and 2, the two independent claims, will be discussed first.

Claim 1, as amended, covers a composition containing vitamin B3, quercetin, and caffeine. Claim 2, as amended, covers a composition containing vitamin C, quercetin, and caffeine. In both compositions, caffeine is added in pure form.

The '195 patent discloses a composition containing, among others, vitamin B3, vitamin C, quercetin, and a green tea extract. While green tea leaves contain caffeine, a green tea extract may be caffeine-free. Enclosed herewith as "Exhibit A" is a copy of a Web page showing a caffeine-free green tea extract. The '195 patent does not specify whether caffeine is included in the green tea extract. Indeed, it does not mention caffeine at all. As this reference

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<sup>1</sup> Claim 1, as amended, recites "wherein caffeine is added in pure form." Composition A described at page 5, lines 11-14 was prepared by mixing 1000 mg of caffeine with other ingredients. In other words, caffeine was added in pure form.

does not teach a composition containing caffeine, it does not anticipate claims 1 and 2, which recites caffeine added in pure form.

Even if the green tea extract in the '195 patent composition contains caffeine (which Applicants do not concede), this reference still does not anticipate claims 1 and 2. More specifically, as a green tea extract containing caffeine and co-extracted components, it is different from caffeine in pure form. Thus, the '195 patent composition, which includes a caffeine-containing green tea extract, is different from the composition of claim 1 or 2, which contains caffeine added in pure form.<sup>2</sup>

For the same reasons set forth above, claims 3, 4, 7-9, and 16-21, dependent from claim 1 or 2, are also not anticipated by the '195 patent.

Claims 22 covers a method of using a composition of claim 1 to enhance physical performance. Claims 23-25 and 28 covers a method of using a composition of claim 2 to enhance physical performance. As claims 1 and 2 are novel, so are claims 22-25 and 28 drawn to use of the composition of claim 1 or 2.

Claims 22-25 and 28 can also be distinguished from the '195 patent on a second and independent ground. These claims cover a method for enhancing physical performance. By contrast, the '195 patent describes a method for treating eye diseases, such as macular degeneration, cataract, and glaucoma. Nowhere is mentioned in this reference enhancement of physical performance as required in claims 22-25 and 28. For this additional reason, the '195 patent also does not anticipate claims 22-25 and 28.

## II

The Examiner rejects claims 1-6 as being anticipated by Gorsek, U.S. Patent 6,551,629 (the '629 patent).

The '629 patent discloses a composition containing, among others, vitamin B3, vitamin C, quercetin, and a green tea extract. This reference, like the '195 patent, is silent on

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<sup>2</sup> Even though claim 1 is open-ended, the claimed composition cannot contain green tea components that would be co-extracted with caffeine, as it is free of a caffeine-containing green tea extract. The same holds for claim 2.

whether the green tea extract contains caffeine. Thus, for the same reasons set forth above, it does not anticipate claims 1 and 2, which recites caffeine added in pure form.

By the same token, claims 3-6, dependent from claim 1 or 2, are also not anticipated by the '629 patent.<sup>3</sup>

### III

The Examiner rejects claims 1-6 and 16 as being anticipated by Anderson et al., U.S. Patent 5,846,569 (the '569 patent).

The '569 patent discloses a composition containing vitamin B3, vitamin C, quercetin, and green tea, but does not specify the form of green tea used in the composition. A fair reading of this reference compels the conclusion that the term "green tea" refers to green tea leaves, which contain caffeine. In other words, the caffeine in the composition of the '569 patent is embedded in green tea leaves. By contrast, the caffeine in the composition of claim 1 or 2 is added in pure form and by no means embedded in green tea leaves. Claims 1 and 2 are therefore not anticipated by the '569 patent.

For the reasons set forth above, claims 3-6 and 16, dependent from claim 1 or 2, are also not anticipated by the '569 patent.

### Rejections under 35 U.S.C. § 103(a)

The Examiner rejects claims 1-15, 26, 27, and 29 for obviousness on various grounds. Applicants will traverse each ground below:

#### I

The Examiner rejects claims 5 and 6 as obvious over the '569 patent.

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<sup>3</sup> Claim 6 recites a green tea extract containing at least one of the following five polyphenolic compounds: epigallocatechin gallate, epicatechin, epicatechin gallate, epigallocatechin, and polyphenon E. Thus, the composition of claim 6 contains, among other, caffeine added in pure form and a caffeine-free green tea extract. This composition is different from the prior art composition described in '629 patent, even if the latter contains a green tea extract having a caffeine and one of the five polyphenolic compounds. More specifically, to extract caffeine and one of the five polyphenolic compounds together, a solvent different from that used to extract only one of the five substance would be used, since caffeine, an alkaloid, is structurally different from polyphenolic compounds. As different solvents are used, components co-extracted with caffeine and one of the five polyphenolic compounds are different from those co-extracted with one of the five polyphenolic compounds.

Claims 5 and 6 depend from claim 2. Their patentability resides at least in part in the unique feature recited in claim 2, i.e., caffeine added in pure form.

As discussed above, the '569 patent discloses a composition containing green tea. Green tea contains myriad compounds. Nowhere is suggested in this reference that caffeine, among the myriad compounds, is an active ingredient. In other words, it does not suggest use of a pure caffeine compound. Thus, the '569 patent does not render obvious claims 5 and 6, which cover compositions containing caffeine added in pure form.

## II

The Examiner rejects claims 1-15 as obvious over the '629 patent in view of Rosenberg et al., U.S. Patent 6,579,544 (the '544 patent), Husz, U.S. Patent 6,277,427 (the '427 patent), Pearson et al., U.S. Patent 6,261,589 (the '589 patent), Pearson et al., U.S. Patent 6,261,589 (the '589 patent), and Xiong et al., U.S. Patent 6,299,925 (the '925 patent).

Among the rejected claims, only claims 1 and 2 are independent. Applicants submit that the patentability of claims 1-15 resides at least in part in a common feature of the compositions of both claims 1 and 2, i.e., containing caffeine in pure form and quercetin.

The '629 patent discloses a composition containing, among others, vitamin B3, vitamin C, quercetin, and a green tea extract. It fails to teach or suggest including in a composition caffeine added in pure form. The '925 patent describes a green tea extract containing polyphenol compounds. Like the '629 patent, it fails to teach including in a composition caffeine added in pure form. Further, it does not mention quercetin at all. The '544 patent teaches a composition containing vitamins, minerals, and carotenoids. It mentions neither caffeine nor quercetin.

As none of '629, '544, and '925 patents discloses using caffeine in pure form, these references, alone or taken together, do not suggest a composition containing caffeine in pure form and quercetin. In other words, it does not suggest mixing caffeine in pure form and quercetin.

The other references, the '427 patent and the '589 patent, do not cure this deficiency. The '427 patent discloses a beverage prepared by mixing caffeine with the following ingredients:

ascorbic acid, iron, organic and inorganic food acids, mineral salts, sweeteners, auxiliary agents, vitamins, and aromatic substances. The '589 patent discloses a composition prepared by mixing caffeine with the following ingredients: phenylalanine, vitamin B6, vitamin C, copper, folic acid, taurine, vitamin B5, choline, fruit sugar, and caffeine. There is no suggestion in either of these two references that caffeine be mixed with other ingredients, e.g., quercetin, a component of the compositions of claims 1 and 2. As mentioned above, the other three references also do not suggest mixing caffeine in pure form and quercetin. Without such a suggestion in any of the cited references, one skilled in the art, in view of them, would have not been motivated to arrive at the compositions of claims 1 and 2, in which caffeine in pure form is mixed with quercetin.

For the reasons set forth above, claims 1-2 are not rendered obvious by a combination of the '629, '544, '925, '589, and '427 patents. Neither are claims 3-15, dependent from either claim 1 or claim 2.

### III

The Examiner rejects claims 26, 27, and 29 as obvious over the '629 patent in view of the '544 patent, the '427 patent, the '589 patent, and the '925 patent, and further in view of the '569 patent.

Claims 26, 27, and 29, dependent from claim 23, cover a method of using the composition of claim 2 to enhance physical performance.

As discussed immediately above, a combination of the '629, '544, '427, '589, and '925 patents does not render obvious the composition of claim 2, since none of them suggests mixing caffeine in pure form with quercetin. The '569 patent teaches a composition containing vitamin B3, vitamin C, quercetin, and green tea. As it does not mention caffeine in pure form at all (see *supra* page 9, line 6-12 and page 10, lines 1-5), its combination with the other five references also does not suggest mixing caffeine in pure form with quercetin. Thus, a combination of all six references also fails to suggest the composition of claim 2. Claims 26, 27, and 29, which require use of this composition, are therefore not rendered obvious by the combination.

Double patenting rejection

The Examiner rejects claims 1-29 under the judicially created doctrine of obviousness-type double patenting rejection in view of claims 1-24 of U.S. Patent No. 6821,536.

In the sole interest of moving this application toward allowance, Applicants have submitted herewith a terminal disclaimer to obviate this rejection.

CONCLUSION

Applicants submit that the rejections asserted in the Office Action have been overcome and claims 1-29, as pending, are novel and non-obvious over the cited references. Applicants respectfully request allowance of all pending claims.

Enclosed is a \$60 check for the Petition for Extension of Time fee. Please apply any other charges or credits to deposit account 06-1050.

Respectfully submitted,

Date: 12-27-05

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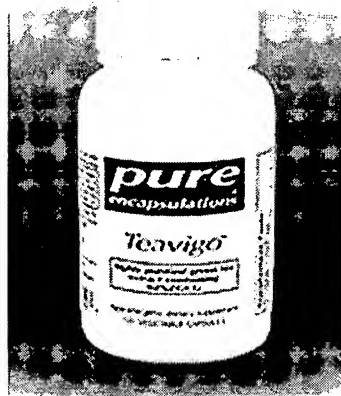
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REFERENCE: Lee YK, Bone ND, Strega AK, Jelinek DF, Kay NE. VEGF receptor phosphorylation status and apoptosis is modulated by a green tea compound epigallocatechin-3-gallate (EGCG), in B-cell chronic lymphocytic leukemia 1;104(3):788-94.

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